No. 10021

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

*Appellant,*

*vs.*

L. BOTELER, Trustee in Bankruptcy of the Estate of DAVIS STANDARD BREAD COMPANY, a corporation,

*Appellee.*

## BRIEF OF APPELLEE.

FRANK C. WELLER,
THOMAS S. TOBIN,
817 Board of Trade Building, Los Angeles,
WILLIAM E. WOODROOF,
407 Title Insurance Building, Los Angeles,
*Attorneys for Appellee.*



Parker & Baird Company, Law Printers, Los Angeles.

## TOPICAL INDEX.

PAGE

Any provision in the Retail Sales Act of California or the Rules and Regulations of the State Board of Equalization under which it is contended additional burdens or duties may be imposed upon a trustee in bankruptcy, is in conflict with its applicability to federal law, and is unconstitutional.................... 9

Has the trustee a plain, speedy and adequate remedy at law such as would bar him from injunctive relief here?.................... 17

The contention that the referee acted beyond his jurisdiction is wholly without merits, as the referee is not seeking to restrain a court .................................................................................... 21

Conclusion .................................................................................... 22

## TABLE OF AUTHORITIES CITED.

### Cases.


| | |
|---|---|
| | PAGE |
| Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300 | 19 |
| Bigsby v. Johnston, 18 Cal. (2d) 860 | 7 |
| Boteler v. Ingals, 308 U. S. 57 | 14 |
| Brinn, In re, 262 Fed. 527 | 9 |
| Bryan v. Berscheimer, 181 U. S. 188 | 20 |
| Caldwell v. Sioux Falls Stockyard Co., 242 U. S. 559 | 18 |
| Claybrook v. City of Owensboro, 16 Fed. 297 | 18 |
| Continental Building & Loan Association v. Superior Court, 163 Cal. 579 | 9 |
| Dayton v. Standard, 241 U. S. 588 | 17 |
| Donnelly v. Southern Pacific Co., 18 Cal. (2d) 863 | 7, 10 |
| Evansville Brewing Ass'n. v. Excise Commission of Jefferson County, Alabama, 225 Fed. 204 | 22 |
| Fox Film Corpn. v. Trumbull, 7 Fed. (2d) 715 | 18 |
| Hebert v. Crawford, 228 U. S. 204 | 20 |
| Holmes v. Rowe, 97 Fed. (2d) 537 | 9 |
| Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734 | 20 |
| Keystone Driller Co. v. Superior Court, 138 Cal. 738 | 9 |
| Lambertville Rubber Co., Inc., Debtor, Matter of, 111 Fed. (2d) 45 | 20 |
| McNaughton v. Johnson, 242 U. S. 344 | 18 |
| Miller v. Nugent, 184 U. S. 1 | 20 |
| Minneapolis Brewing Co. v. McGillivray, 104 Fed. 258 | 19 |
| Moore v. Bay, 284 U. S. 4 | 12 |
| Murphy v. John Hoffman Co., 211 U. S. 562 | 19 |
| Pennsylvania v. West Virginia, 262 U. S. 553 | 18 |
| Pierce v. Society of the Sisters, 268 U. S. 510 | 18 |
| Southern Bell Telephone Co. v. Caldwell, 67 Fed. (2d) 802 | 13 |
| Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426 | 20 |
| Tyson & Bro. United Theatre Ticket Officers v. Banton, 273 U. S. 418 | 18 |
| Union League Club v. Johnson, 18 Cal. (2d) 275 | 7 |

PAGE

Union Light, Heat & Power Co. v. Railroad Commission of Kentucky, 17 Fed. (2d) 143 ........ 22
United States v. Kaplan, 74 Fed. (2d) 664 ........ 20
United States ex rel. Willoughby v. Howard, 302 U. S. 445, 35 Am. B. R. (N. S.) 258 ........ 20
Van Deman & Lewis Co. v. Rast, 214 Fed. 827 ........ 18
Wells Fargo & Co. v. Taylor, 254 U. S. 175 ........ 18
White v. Schloerb, 178 U. S. 542 ........ 20
Wofford Oil Co. v. Smith, 263 Fed. 396 ........ 18
Yee Gee v. City & County of San Francisco, 235 Fed. 757 ........ 18

## Statutes.

Constitution of the United States, Art. 1, Sec. 8 ........ 2
National Bankruptcy Act of 1898 ........ 9
National Bankruptcy Act, Sec. 2, Subdv. (5) (11 U. S. C. A., Sec. 11, Subdv. (5)) ........ 5, 6, 13
National Bankruptcy Act, Sec. 2, Subdv. 15 (11 U. S. C. A., Sec. 11) ........ 2, 21
National Bankruptcy Act, Sec. 2, Subdv. 21-b ........ 3
National Bankruptcy Act, Sec. 33 (11 U. S. C. A., Sec. 61) ........ 16
National Bankruptcy Act, Sec. 34 (11 U. S. C. A., Sec. 62) ........ 16
National Bankruptcy Act, Sec. 35 (11 U. S. C. A., Sec. 63) ........ 16
National Bankruptcy Act, Sec. 38 (11 U. S. C. A., Sec. 66) ........ 21, 22
National Bankruptcy Act, Sec. 44 (11 U. S. C. A., Sec. 72) ........ 16
National Bankruptcy Act, Sec. 45 (11 U. S. C. A., Sec. 73-a) ........ 3, 16
National Bankruptcy Act, Sec. 47 ........ 1, 8, 13, 14
National Bankruptcy Act, Sec. 47-a (11 U. S. C. A., Sec. 75-a) ........ 3, 8
National Bankruptcy Act, Sec. 47-a, Subdvs. (2), (4) ........ 19
Pure Food and Drug Act ........ 17
Sales Tax Act, Sec. 15 ........ 17
United States Code, Annotated, Title 28, Sec. 124-a ........ 12, 13
Supreme Court General Order No. XII ........ 21
Supreme Court General Order No. XVII ........ 14

This case, stripped down to essentials, simply resolves itself into two questions:

1. Has the State of California, or any other State in the Union, the right to project itself into the administration of bankrupt estates, a field reserved entirely to Congress, and to require officers of the United States District Court to take out licenses permitting them to convert the bankrupt's assets into cash and then to impose a tax on the proceeds of such judicial sales?

2. Has the United States District Court the power and jurisdiction to protect its own officers from such illegal encroachment upon their duties and prerogatives as is here sought to be inflicted by the State of California?

Under Section 8, Article 1 of the Constitution of the United States, Congress is given the sole and exclusive power to "establish uniform laws on the subject of bankruptcies throughout the United States." Acting under this grant of power Congress enacted the National Bankruptcy Act which defines, among other things, the jurisdiction of the United States District Courts in bankruptcy matters and the rights and duties of a trustee thereunder.

Section 2 of the Bankruptcy Act (11 U. S. C. A., Sec. 11), confers jurisdiction on United States Courts, among other matters, as follows:

> Subdv. (15). "Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act; provided however, that an injunction to restrain a court may be issued by the judge only."

Subdivision 21-b of Section 2 expressly provides:

> "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

Section 47-a of the Bankruptcy Act (11 U. S. C. A., Sec. 75-a) prescribes that mandatory duties of the trustee, as follows:

> "Trustees shall (1) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest."

In the case at bar the trustee, in disposing of the assets at private sale, after an attempt had been made to sell them at public auction without a satisfactory bid, was carrying out the plain mandate of Section 47-a of the Bankruptcy Act. Nowhere in Section 47-a is there any requirement that he take out a state license or pay a state sales tax in connection with the judicial sale conducted "under the direction of the court."

Section 45 of the National Bankruptcy Act (11 U. S. C. A., Section 73-a) prescribes the qualification of receivers and trustees, as follows:

> "Receivers and trustees shall be (1) individuals who are competent to perform their duties, and who reside or have an office within the judicial district in which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed."

Nowhere is there any requirement in Section 45 that a trustee in bankruptcy, an individual, shall be required, at the expense of the bankrupt estate or otherwise, to take out a license from a State authorizing him to or extending to him the "privilege" of performing the duties imposed upon him by the United States Statute under which his office is created.

If the construction of the trustee's rights and duties sought here by the State Board of Equalization were to be recognized there would be nothing to prevent the various States, in their search for revenue, in prescribing by State law that any person seeking to act as a receiver or trustee in bankruptcy, before entering upon his duties as such receiver or trustee in bankruptcy, and before liquidating the assets of bankrupt estates entrusted to him, should first procure a license from the State granting him the "privilege" of acting in such official capacity, such license to cost the sum of $500.00 for each estate so administered and liquidated. One may well imagine the consternation and confusion which would result from the enactment of such a law, but we respectfully submit that if the State of California has a right to exact a license from a trustee in bankruptcy conducting a judicial sale and to require him to pay a fee of $1.00, then it would have a right to raise the price to $500.00, if such a right exists at all. Encroachments such as this are not accomplished in one single sweep. A crack, of an apparently innocuous nature, is usually cleverly opened and if the encroachment is tolerated, gradually expanded until it becomes intolerable. The most common instance has been the expansion by the States of penny sales taxes on gasoline, imposed first for the building and maintenance of highways, at the rate of one per cent per gallon,

increased to two or three cents for the same purpose, and then other additions made thereto, a cent or two at a time, for the State's general fund, for school purposes, for relief, and what not, with the result that taxes as high as twenty-five per cent *ad valorem* are being levied on gasoline in some States.

We submit that when the State attempts to project itself into a jurisdiction essentially federal, such attempt should be promptly nipped in the bud.

It must be borne in mind that this is not a case where the trustee is operating the business for a limited period, as provided in Subdivision (5) of Section 2 of the National Bankruptcy Act (11 U. S. C. A., Sec. 11, Subdv. (5)) which provides that courts of bankruptcy have jurisdiction to,

> "Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees if necessary, in the best interests of the estates, and allow such officers additional compensation for such services as provided in Section 48 of this Act."

We recognize the fact that there are certain types of businesses in which any person is required to take out a license in order to operate, such as tavern keepers, liquor stores, pawnbrokers, and other businesses regulated under the police power. If the trustee desires to exercise the privilege conferred upon him under Sec. 2, Subdv. (5) of the Bankruptcy Act, of "operating the business of the bankrupt for a limited time," there is no question but that he would be required, when exercising such privilege, to conform to the laws of the State and to the Ordinances of the municipality. Certainly we do not contend that

a trustee in bankruptcy operating, for example, a chain of taxicabs, would have the right to drive his cabs around the City of Los Angeles without a State automobile license on them. We recognize the fact that if he attempted to operate a bar, even for a limited time, without a license, he would be prosecuted for bootlegging. In neither instance would he be required to "operate the business for a limited time." His temporary operation is merely discretionary and he may avail himself of the privilege conferred under Sec. 2, Subdv. (5) of the Bankruptcy Act, or he may close down the business entirely, at once without temporary operation.

On the other hand, the conversion of the assets into cash under the direction of the court, as provided in Sec. 47-a, leaves him no discretion whatsoever; his duties are mandatory, and the carrying out of those duties is not a "privilege" as is here contended by the Attorney General.

An examination of the Attorney General's brief, pages 5 to 11 inclusive, fails to distinguish between a privilege and a mandatory duty imposed by Congress under its constitutional grant of power.

Throughout the argument in the pages cited, the Attorney General constantly refers to the "privilege" of the trustee to perform his duties in converting the assets of the bankrupt estate into cash, and at page 8 states that the trustee, in liquidating this estate, is engaged in the "business" of selling at retail and is subject to the State sales tax. The argument further goes on to say that the construction of a State statute placed thereon

by a State court is binding upon the Federal Courts. In making this statement counsel overlooks the exception to the rule that such construction does not apply in jurisdictions essentially federal.

As hereinafter pointed out, the Supreme Court of California in *Donnelly v. Southern Pacific Co.,* 18 Cal. (2d) 863, recognizes this rule in an opinion involving a judgment for damages for personal injuries sustained by a person in a railroad collision, while traveling on a free pass, regulated by Interstate Commerce Acts, and after discussing the various federal and state decisions involving the right to recover from a common carrier while riding on a free pass, the Supreme Court, in reversing the judgment of the Superior Court, said:

> "This negligence may have been gross under the California rule, but the Federal cases are clear that such dereliction constitutes negligence and not wanton and reckless misconduct."

In this connection the rules laid down by the Supreme Court of California in *Bigsby v. Johnston,* 18 Cal. (2d) 860, and *Union League Club v. Johnson,* 18 Cal. (2d) 275. are entirely beside the point. Neither *Bigsby* nor the *Union League Club* were trustees in bankruptcy, nor were their sales upon which the State imposed a tax, judicial sales conducted under a United States Statute in a United States Court; neither was any mandatory duty imposed upon them to make these sales. If they desired, they had a right to retain the property. A trustee in bankruptcy has no such right, as the statute under which his office

is created requires him to collect and reduce to money the property for which he is trustee, under the direction of the court, and to close up the estates as expeditiously as is compatible with the best interests of the parties in interest. (Bankruptcy Act, Sec. 47-a (11 U. S. C. A., Sec. 75-a).)

In the argument the dogmatic assertion is made that:

> "The payment of this tax is not a charge upon the estate. It is the *duty* of the trustee in bankruptcy to collect this tax from the purchasers and to pay it into the State Treasury. He performs this *duty* in return for the *privilege of selling to consumers,* and not for resale in the State of California." (Italics ours.)

We have scrutinized Section 47 of the Bankruptcy Act with a great deal of care and nowhere in the Bankruptcy Act do we find any such duty imposed upon the trustee, neither do we find any restrictions anywhere in the Bankruptcy Act as to what persons or classes of persons a trustee may sell assets belonging to a bankrupt estate. The only requirement that we know of is the common sense requirement that the purchaser have the cash to pay for the property. We fail to see where the performance of his mandatory duty in selling to consumers or anybody else, constitutes a "privilege" in the State of California where we have a sales tax, and does not constitute such a "privilege" in the State of Nevada, which has been free from that form of irritating gadfly in the tax field.

**Any Provision in the Retail Sales Act of California or the Rules and Regulations of the State Board of Equalization Under Which It Is Contended Additional Burdens or Duties May Be Imposed Upon a Trustee in Bankruptcy, Is in Conflict With Its Applicability to Federal Law, and Is Unconstitutional.**

It has long been settled that where Congress exercises its exclusive jurisdiction, as in the domain of interstate commerce, bankruptcy, naturalization, and other exclusive legislative fields delegated to it, all state laws on those subjects are superseded; as, for instance, upon the enactment of the Bankruptcy Act of 1898, after a long period during which this country had no Bankruptcy Act, all State Insolvency Laws were suspended and superseded and their courts deprived of jurisdiction over the subject. (*Holmes v. Rowe,* 97 Fed. (2d) 537, C. C. A. 9th Cir.; *In re Brinn,* 262 Fed. 527.)

In *Keystone Driller Co. v. Superior Court,* 138 Cal. 738, the court said:

> "Our State Insolvency Law is suspended by the National Bankruptcy Law of 1898."

In *Continental Building & Loan Association v. Superior Court,* 163 Cal. 579, the Supreme Court said:

> "If these positions are well taken the conclusion for which petitioner contends is irresistible, for it is conceded that petitioner is a corporation conducting a business which brings it within the scope and purview of the National Bankruptcy Act, and it is unquestioned that when the general government has spoken upon the subject of bankruptcy, the operation of all state laws upon the same subject matter is suspended. The ultimate question then, is

whether under these concessions and admissions there is still left in the state law any valid provisions entirely without the scope of the National Bankruptcy Act, which provisions may be enforced by the State Courts, or whether, as petitioner contends, the state law is as a whole, and without severable or separable parts a single bankruptcy or insolvency act."

In the latter case the Supreme Court of California held that a punitive law requiring liquidation of building and loan associations under certain conditions not constituting an act of bankruptcy, did not conflict with the Bankruptcy Act, but nevertheless, recognized the principle that when Congress has legislated on the subject, the State law is powerless.

In the recent case of *Donnelly v. Southern Pacific Co.*, 18 Cal. (2d) 863, involving a California statute and its operation on passengers traveling in interstate commerce, the Supreme Court says:

"If a statute is enacted by Congress covering the subject of the state's regulation, it supersedes the state statute or decision. Southern Ry. Co. v. Railroad Commission of Indiana, 236 U. S. 439; Southern Express Co. v. Byers, 240 U. S. 612; Adams Express Co. v. Croninger, 226 U. S. 491; Western Union Tel. Co. v. Speight, 254 U. S. 17; Western Union Tel. Co. v. Commercial Milling Co., 218 U. S. 406. If, however, Congress enacts a statute that embraces the general field but does not cover the matter on which the state has ruled, the state statute or decision is superseded only if Congress intended by such legislation to occupy the entire field, thereby excluding all state control. (Atchison T. & S. F. Ry. Co. v. Railroad Commission, 283 U. S. 380; Kelly v. Washington, 302 U. S. 1; H. P. Welch Co.

v. New Hampshire, 306 U. S. 79; Kansas City So. Ry. Co. v. Van Zant, 260 U. S. 459; Southern Express Co. v. Byers, supra,) and numerous other citations. The state courts are then bound by federal decisional law in the field. (Kansas City So. Ry. Co. v. Van Zant, supra; Southern Express Co. v. Byers, supra; Adams Express Co. v. Croninger, supra; Western Union Tel. Co. v. Speight, supra.)

In 1906 Congress passed the Hepburn Act regulating the issuance of free passes by interstate carriers. The act deals only with the classes of person to whom free passes may be issued and contains nothing about the liability of carriers to such passengers, nor the terms of the passes. Generally an act of Congress is not regarded as superseding a state statute or decision unless the two conflict or the state law stands in the way of congressional objectives. (H. P. Welch Co. v. New Hampshire, supra; Kelly v. Washington, supra; Atchison T. & S. Ry. Co. v. Railroad Commission, supra; Maurer v. Hamilton, 309 U. S. 598; Palmer v. Mass, 308 U. S. 79.) Nothing in the Hepburn Act conflicts with state rules on liability for negligence, and it sets forth no objective that would be hindered by the application of state law. Nevertheless, the Supreme Court of the United States took the position in Kansas City Southern Ry. Co. v. Van Zant, supra, that the Hepburn Act was intended to occupy the entire field of free passes, that it superseded all state law in the field, and that the decisions of the federal courts were therefore controlling on the liability of a carrier for negligence to a holder of a pass containing an exculpatory provision. This court is bound by that decision and must therefore disregard the California law and apply the rules established by the decisions of the Federal Courts."

In the case of *Moore v. Bay,* 284 U. S. 4, the court said:

> "The Circuit Court of Appeals affirmed an order of the District Judge giving the mortgage priority over the last creditors. Whether the court was right must be decided by the Bankruptcy Act, since it is superior to all State laws upon the subject. Globe Bank & Trust Co. v. Martin, 238 U. S. 288."

We think it is clear that Congress intended to legislate fully with regard to the qualifications and duties of trustees in bankruptcy. It has not seen fit to require them to take out sales tax license from the States permitting them to perform their mandatory duties. The fact that Congress in 1934 enacted Section 124-a of Title 28 of U. S. C. A., requiring "any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States Court, *who is authorized by said court to conduct any business and who does conduct any business,* shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if said business were conducted by an individual or corporation," does not mean a thing in this case. In the first place it does not purport to be an amendment to the Bankruptcy Act, which expressly prescribes the duties of the trustee. In the second place the trustee here is not operating the business, but is liquidating it in accordance with the plain mandate of the law. Trustees in bankruptcy stand in a much more advantageous position than do receivers in equity, assignees for the benefit of creditors, and other types of liquidators. The Federal Courts make a distinction between the disabilities of equity receivers and of receiverships so operated and the privileges accorded to a trustee or receiver in bankruptcy. For ex-

ample, in *Southern Bell Telephone Co. v. Caldwell*, 67 Fed. (2d) 802, in discussing the question of priorities in bankruptcy as distinguished from equity receiverships, the Circuit Court of Appeals for the Eighth Circuit said:

> "It is conceded that there is no decision in bankruptcy affording any support to the appellant's claim of priority. The equity foreclosure cases like Miltenberger v. Logansport C. & S. W. R. Co., 106 U. S. 286, (and a number of other cases cited) * * * are without application, and we have no occasion to review them."

Furthermore, the very fact of the passing of the statute referred to (Section 124-a, Title 28 U. S. C. A.) indicates clearly that Congress felt that prior to June 18, 1934 trustees in bankruptcy *operating a business* under the provisions of Subdv. (5) of Section 2 of the Bankruptcy Act were exempt from all taxes imposed by States and local municipalities during the period of their operation, and by the enactment of this statute permitted States and local political bodies to levy taxes on the actual operation of such business.

It is significant, however, to note that there is no permission contained in Section 124-a, Title 28 authorizing State and local governments to tax the proceeds of judicial sales in bankruptcy, or otherwise.

It is further highly significant that the Bankruptcy Act was completely overhauled in 1938, five years after sales taxes became the rage throughout the United States. If it were the intent of Congress to require trustees to pay sales tax on the proceeds of judicial sales or to take out State licenses, it seems to us that such provision would have been placed in Section 47, which was one of the sections completely overhauled in the 1938 amendment.

Furthermore, the Supreme Court thereafter enacted General Order XVII as a supplement to Section 47 and did not see fit to impose these additional responsibilities or requirements on the trustee.

A great deal of the difficulties which trustees have been encountering with the State Board of Equalization in the last several months are occasioned by a misinterpretation of the case of *Boteler v. Ingals,* 308 U. S. 57. In that case Boteler, as trustee in bankruptcy, was operating a large dairy. He had a number of milk trucks making daily deliveries throughout Los Angeles County and operating on the public highways. On January 1st he did not have sufficient funds in his possession to purchase new license, and the same condition existed after the deadline for obtaining new licenses without penalty on February 5th had passed. Shortly after February 5th he obtained sufficient money to purchase licenses and applied to the Motor Vehicle Department for new licenses for his trucks, tendering it the normal fee. The Motor Vehicle Department refused to issue the licenses without payment of the penalty and Boteler sought mandamus from the Referee. The Referee entered an order requiring the issuance of the licenses, which order was affirmed by the District Court, both lower courts holding that the trustee was not subject to such penalty. This court reversed the order, and the Supreme Court granted certiorari. In the opinion in that case Mr. Justice Black was careful to point out that the trustee was *operating the business* and that the penalty constituted a license fee for the privilege of using the highways of the State of California, and that if the trustee saw fit to use the highways in the conduct of the business he was required to comply with the reasonable police regulations of the State.

That theory is reasonable enough. Certainly no one would contend that a trustee in bankruptcy, the Governor of California, or even the President of the United States would not be bound to comply with police regulations in connection with the use of the highways. We certainly would not contend that a trustee in bankruptcy, because he was a trustee operating a dairy business, would have a right to drive his trucks on the sidewalk instead of remaining on the pavement, or drive them sixty miles an hour across the intersection of Seventh and Broadway, but we do contend that the State of California has no right to pass legislation which hampers, interferes with or penalizes the trustee in the performance of his mandatory duties under the Bankruptcy Act. If, in the instant case, the trustee can be compelled to collect and pay sales tax on piecemeal, private, liquidating sales of the bankrupt's machinery, ovens, and other equipment, then the State Board of Equalization will have a right to place its representative in the Bankruptcy Courts each morning when assets of bankrupt estates are being auctioned off by trustees in the presence of the Referee, and to demand that the Referee and the trustee collect sales taxes on all property so sold and pay it over to the State of California. In addition thereto each trustee in bankruptcy will be obliged in each and every case to take out a license with the State of California authorizing him to conduct his judicial sales in the United States District Court rooms. Possibly the Referees in Bankruptcy, arms of the court, would likewise be expected to take out licenses for the privilege of participating in bankrupt sales in their own courts.

This analogy is not in anywise far-fetched, because the office of trustee is created in the same section of the Bankruptcy Act as is the office of referee.

Section 33 of the Bankruptcy Act (11 U. S. C. A., Sec. 61), reads as follows:

> "The offices of referee and trustee are hereby created."

Section 35 of the Bankruptcy Act (11 U. S. C. A, Sec. 63), sets forth the qualifications of referees.

As heretofore pointed out, Section 45 of the Bankruptcy Act (11 U. S. C. A., Sec. 73) specifies the qualifications of trustees. Certainly it could not be contended that the State of California would have a right to impose upon the qualifications of referees in bankruptcy the requirement that *they* obtain licenses from the State to perform their official duties, or that they pay a tax to the State for the privilege of entering orders confirming sales, or performing any other of their official duties.

The referee is appointed by the court under Section 34 of the Bankruptcy Act (11 U. S. C. A., Sec. 62). The trustee is elected by the creditors of the bankrupt at the first meeting of creditors, after adjudication; or, in some instances, is appointed by the court under the provisions of Section 44 of the Bankruptcy Act (11 U. S. C. A., Sec. 72). Both are equally officers of the court, save and except that a trustee, although he may be the same person, is an entirely different entity in each case in which he is elected, and under the contentions made by the State of California he would be required to take out a separate sales tax license in each case in which he was trustee in order to perform his official duties. It is just as reasonable to assume that the State of California could require the United States Marshal for the Southern District of California to take out a sales tax license and collect and pay over a sales tax on property

sold by him under writ of execution issued out of the court on the law or equity side, or in disposing of property libeled under the process of the United States District Court under the Pure Food and Drug Act, as it would be to require a trustee in bankruptcy whose functions in bankruptcy administration are similar to those of a United States Marshal in so far as property of the bankrupt estate is concerned, to ask for and pay the State of California for the same privilege.

### Has the Trustee a Plain, Speedy and Adequate Remedy at Law Such as Would Bar Him From Injunctive Relief Here?

We believe that the contention in the lower court that the trustee is not entitled to injunctive relief is wholly and completely without merit. Here we have the situation of a State Board seeking to interfere with a trustee, an officer of the United States court, in the conduct of his mandatory duties, and demanding that he take out a license under penalty. (See Sales Tax Act, Sec. 15.)

To say that such court has not the power to protect its officers in the control and disposal of property in its possession and in the performance of their mandatory duties would, we believe, on its face, seem ridiculous. (See *Dayton v. Standard,* 241 U. S. 588.) However, Federal Courts have jurisdiction also to enjoin enforcement of an unconstitutional State statute by State officers clothed with authority to enforce it where it violates Federal Constitution.

See:

*Tyson & Bro. United Theatre Ticket Officers v. Banton,* 273 U. S. 418;

*Pennsylvania v. West Virginia,* 262 U. S. 553;

*Fox Film Corpn. v. Trumbull,* 7 Fed. (2d) 715;

*McNaughton v. Johnson,* 242 U. S. 344;

*Claybrook v. City of Owensboro,* 16 Fed. 297;

*Wells Fargo & Co. v. Taylor,* 254 U. S. 175;

*Caldwell v. Sioux Falls Stockyard Co.,* 242 U. S. 559.

The right to enjoin a state officer from enforcing a state statute claimed to violate the Federal Constitution is not affected by whether the enforcement is to be by civil or criminal proceedings.

See:

*Van Deman & Lewis Co. v. Rast,* 214 Fed. 827;

*Yee Gee v. City & County of San Francisco,* 235 Fed. 757;

*Pierce v. Society of the Sisters,* 268 U. S. 510.

It has been held that the institution of separate actions to recover fees paid under an alleged unconstitutional statute is not an adequate remedy at law, as was contended by the Attorney General.

See:

*Wofford Oil Co. v. Smith,* 263 Fed. 396.

It has also been held that a Federal Court has jurisdiction to enjoin the enforcement of a state statute which is unconstitutional and void, and under which the authorities threaten to seize complainant's property and destroy his business unless he pays a license thereby imposed.

See:

*Minneapolis Brewing Co. v. McGillivray,* 104 Fed. 258.

In the case at bar, under the State's theory the trustee in bankruptcy, an officer of the United States District Court, should pay this illegal tax and license fee out of funds in *custodia legis* in a Federal Court, to a State Board, and then, notwithstanding the fact that he is an officer of the United States District Court, go into the State courts and maintain expensive litigation to recover it back. Such requirement would be absolutely unreasonable. The State Board of Equalization is demanding that the Bankruptcy Court and its officers pay over to it certain sums of money, disbursement thereof being required to be made by check or draft on designated depositories of bankruptcy funds.

*Bankruptcy Act,* Sec. 47-a, Subdvs. (2) and (4).

These checks are required to be countersigned by the Referees. We would therefore be faced with the anomalous situation of requiring the two officers of the court designated by the National Bankruptcy Act, to pay over to a State Board sums of money in their joint possession, and then to go into the State courts and attempt to get it back. We do not believe that this court, or any other Federal Court would for a moment tolerate such roundabout and expensive procedure to recover back funds which have already been in the custody of the Bankruptcy Court and subject to its exclusive summary jurisdiction.

See:

*Acme Harvester Co. v. Beekman Lumber Co.,* 222 U. S. 300;

*Murphy v. John Hoffman Co.,* 211 U. S. 562;

*White v. Schloerb*, 178 U. S. 542;
*Bryan v. Berscheimer*, 181 U. S. 188;
*Miller v. Nugent*, 184 U. S. 1;
*Hebert v. Crawford*, 228 U. S. 204;
*Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U. S. 426;
*Isaacs v. Hobbs Tie & Timber Co.* 282 U. S. 734.

Furthermore, the trustee is under bond, and in the payment of taxes illegally, or in his refusal or failure to pay a tax legally assessed, he may be held responsible.

See:

*United States ex rel. Willoughby v. Howard*, 302 U. S. 445, 35 Am. B. R. (N. S.) 258;
*Matter of Lambertville Rubber Co., Inc., Debtor*, 111 Fed. (2d) 45;
*United States v. Kaplan*, 74 Fed. (2d) 664.

If he closes the estate without making the payments demanded by the State Board of Equalization he may find himself subjected to a multiplicity of litigation and the possibility of a suit being instituted against him in the State courts for a recovery of the alleged license fee, together with the sales tax demanded, and the necessity of reopening this bankrupt estate and seeking the protection of this court from vicious and harassing litigation; all of it at his own expense, inasmuch as the bankrupt estate would have been closed and its funds distributed.

We respectfully submit that the trustee was entitled to the relief prayed for and to the protection of the court, and that the Referee and District Court were right in according him such protection.

## The Contention That the Referee Acted Beyond His Jurisdiction Is Wholly Without Merits, as the Referee Is Not Seeking to Restrain a Court.

It was contended by the Attorney General in the District Court that a Referee in Bankruptcy has no power to enjoin a State officer in the enforcement of a State Statute. With that we disagree.

Section 38 of the Bankruptcy Act (11 U. S. C. A., Sec. 66) vests the Referee, subject to a review by the Judge, with jurisdiction to,

> "(6) Perform such of the duties as are by this Act conferred upon Courts of Bankruptcy, including those incidental to ancillary jurisdiction, and as shall be prescribed by rules or orders of the Courts of Bankruptcy of their respective districts, except as herein otherwise provided."

Section 2, Subdivision (15) (11 U. S. C. A., Sec. 11, Subdv. 15), vests Courts of Bankruptcy with jurisdiction to,

> "Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provision of this Act. Provided, however, *that an injunction to restrain a court may be issued by the Judge only.*"

General Order No. XII there cited by the Attorney General in nowise alters the Referee's jurisdiction in the case at bar. The Order of Reference in this case was a general Order of Reference. Furthermore, we are not seeking an injunction to stay proceedings of a court, of an officer of the United States or of a State, as no proceedings are pending. We are merely seeking to restrain

the illegal invasion by a certain State Board of the rights of an officer of the Bankruptcy Court.

That an injunction will lie against a State Board or Commission to prevent a violation of the rights of a party under the Federal Constitution, has been held in *Union Light, Heat & Power Co. v. Railroad Commission of Kentucky,* 17 Fed. (2d) 143; also,

> *Evansville Brewing Ass'n. v. Excise Commission of Jefferson County Alabama,* 225 Fed. 204.

The only jurisdiction now expressly withheld from Referees under a general Order of Reference is the power of commitment for contempt. (Bankruptcy Act, Sec. 38, Subdv. (2).) Under the Act of 1938 a general Order of Reference is sufficient to vest them with jurisdiction to adjudicate bankrupts or dismiss petitions, to grant or revoke discharges, and perform many other judicial acts which under preceding bankruptcy laws they were only permitted to certify to the District Judge for determination.

We respectfully submit that the Referee did not act beyond his jurisdiction.

## Conclusion.

We believe that an adverse decision in this case would create nothing but confusion in bankruptcy administration. Although the amount involved in the purchase of a retailer's license is small, if the principle is once recognized that a State Board can compel an officer of the Federal Court to take out a license for the performance of his mandatory duties and can levy taxes on the proceeds of judicial sales in the Federal Courts, then the crack is open and can be steadily enlarged. The result

would be a mess of confusion between the State Boards on the one hand and the Federal Courts on the other, in a field which has always been recognized as essentially and exclusively a Federal one, when Congress chooses to act therein.

If the contentions of the State Board of Equalization in the case at bar are sustained, not only would the trustees be required to purchase a new license for each bankrupt estate they administer (because they are different official entities in each individual), but they would be saddled with the extra accounting work incident to the making of reports to the State Board of Equalization in strictly liquidating sales.

We respectfully submit that the Orders of Referee Brink and Judge Harrison should be affirmed.

Dated: May 19, 1942.

Frank C. Weller,
Thomas S. Tobin,
William E. Woodroof,
*Attorneys for Appellee.*